Are you a startup in Australia? Here are 5 things to keep in mind about Australian employment law

By Joel Cox

For any startup, complying with the framework of Australian employment law is a difficult challenge. Here are five things to keep in mind to ensure the successful progression of your startup from an employment law perspective.

1. Get the basics right

The early stages in the lifecycle of a startup are an ideal time to establish effective and compliant employment law practices. Regardless of the size, structure or sector of your startup, if you have staff working for you, you will have obligations under the *Fair Work Act 2009* (Cth)(the Act).

National employment standards

The Act provides for ten minimum standards known as the National Employment Standards (NES). The standards relate to maximum working hours, flexible work, parental leave, annual leave, personal leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay and the Fair Work Information Statement.

The NES apply to *all national system employees*, which includes the employees of most startups in Australia, including those employed by a foreign entity. The NES provide employment standards which cannot be excluded or reduced by the employer. A number of NES apply to casual employees as well. A contravention of the NES may attract penalties of up to $63,000 for a corporation and in some cases individuals involved in the contravention can be exposed to a penalty of up to $12,600. Higher penalties can apply for breaches involving vulnerable workers.

Employment contract

Many employees in Australia do not have a written employment contract. But there are a number of sound reasons to develop written employment contracts for employees of a startup.

First, a written employment contract establishes a clear outline of the essential conditions of employment. The employment contract will typically provide for the employee's position, duties, probationary period, remuneration, leave, superannuation, notice of termination and post-termination restrictions. These are essential for employees to understand their role in the startup.

Second, an employment contract promotes compliance with the Act and other laws. In addition to the obligations set out in the Act, a startup may also owe other obligations to its employees, including tax, superannuation, long service leave and anti-discrimination. The employment contract is an effective way to ensure compliance with these obligations.

An employment contract is also relevant in workplace disputes. Written terms tend to reduce the potential for disputes. In

addition, where there is no written agreement, the terms of employment are implied by the conduct of the parties. For example, where there is no written notice of termination provision, a court will consider what would have been a reasonable amount of time for the employee to have been notified of termination. There have been cases where this has been as little as 8 weeks to as much as 12 months. Specifying contracting terms provides more certainty for a startup and its employees.

Further, written contracts set out key issues that will not otherwise be implied by the law. If post-employment restraints are important, they must be set out in the written employment contract. The scope of confidential information of the business that must not be misused by an employee is also important to set out in an employment contract.

2. Hire the right people

There are important employment law principles to bear in mind when recruiting prospective employees. Specifically, it is important to be aware of restraint of trade provisions and the ownership of intellectual property.

Restraint of trade

As the name suggests, post-employment restraint of trade provisions are a way for employers to protect their business interests after an employee leaves. These provisions typically restrain the employee from working for a competitor within a certain geography and time period or from soliciting customers or employees of the business they left.

There are a number of principles relevant to determining the enforceability of a restraint of trade provision. Namely, there is a presumption that a restraint of trade provision is void unless, in the special circumstances of the case, the person attempting to enforce the provision, shows that it is reasonable.[1]

Unfortunately, employees may not know whether they are restrained from employment with you. In the recent case of *Just Group Limited v Peck*,[2] the court had to determine whether Just Group's former Chief Financial Officer was restrained from employment with its competitor, Cotton On. The court held that the overreach of the purported restraint of trade clause meant that it was unenforceable.

Accordingly, at the recruitment stage, it is best practice to ask candidates whether they are subject to a post-termination restraint of trade clause under their current employment contract. By asking these questions from the outset, you can make an informed recruitment decision and avoid potential litigation down the track.

Intellectual property

It is also essential to be aware of the intellectual property (IP) that a prospective employee may or may not own. IP is the legal concept of proprietary title to a productive new idea. IP may be an invention, trademark, design, brand or even the application of an idea. A general overview on the importance of IP for startups can be found here.

In the context of employment law considerations for startups, it is important to be aware that employment contracts may provide for the ownership of IP. In most instances, the employment contract will provide that the intellectual property created by its employees in the course of their employment is owned by the employer. This is typically also the common law position in the absence of such a written clause. There may be provision for this in legislation as well.[3]

Case law has tested these principles in circumstances where the scope of one's employment is not clearly defined.[4] Disputes have also arisen where IP has been created by an independent contractor in the course of their independent contract.[5]

Accordingly, for the recruitment of prospective employees, it is important to understand what information candidates own and can share with your startup. especially if they have come from a competitor. Particularly where prospective employees promise to bring a unique concept that they have developed in a previous employment, due diligence is necessary and it is best to ask these questions from the outset.

3. Correctly classify your workers

It is not uncommon for startups to engage independent contractors at particular stages of the startup lifecycle. For example, a startup may benefit more from engaging an independent marketing contractor than hiring a permanent internal marketing team. However, particularly in light of the growing concern for the misclassification of workers in the growing gig economy, appropriate classification of staff is essential for best employment law practice. The financial consequences of misclassification can be significant.

Contractor or employee

A worker is usually classified as either an employee or a contractor and each classification gives rise to different obligations on the part of the employer. Generally, the rights and entitlements owed to employees are more substantive than the those owed to contractors.

A number of factors determine the differences between an employee and a contractor and there is no single determinative factor. If a dispute about classification arises, courts consider the substantive relationship between the parties rather than the classification in the agreement or elements of the relationship such as invoices or the use of an ABN.[6] The Fair Work Ombudsman provides guidance on the application of these factors.

For a startup with staff, it is important to use these factors to appropriately classify workers as either employees or contractors. Doing so is important for compliance under the Act and to avoid claims for backpay of employee entitlements or access to employee remedies that were not anticipated.

4. Think about your policies

Effective workplace policies and procedures are essential for best employment law practice. In addition, they are often an integral part of setting up and driving the culture of the startup. In order to address many of the workplace issues in which a startup will have obligations, policies are important to ensure compliance. Among other things, policies must address discrimination, bullying and harassment, and health and safety.

An effective workplace policy must provide for the consequences of breach of that policy. This may include an informal warning, a formal written warning or even termination of employment.

In the current workplace climate, a discrimination, bullying and harassment policy is fundamentally important as well. It should define what constitutes workplace discrimination, bullying and harassment and specify that discrimination and sexual harassment is unlawful. It should also outline the potential impact of this behaviour on the individual, the organisation and

society. The policy should also establish reporting mechanisms and expressly state the company's commitment to a safe and respectful workplace, free from discrimination, bullying and harassment.

5. Review

Reviewing employment practices is the final and most difficult piece of the puzzle. Startups, more so than other businesses, are constantly evolving. This means that your employment practices must be adapted and regularly reviewed. You may need to periodically ask the following:

- Does the original employment contract appropriately reflect the employee's current position in my startup?
- Are the restraint of trade and intellectual property provisions tailored to each particular employee, and does the employee's contract effectively protect my business interests if the employee leaves my company?
- Have I appropriately classified my employees regarding the current and substantive role they perform in my business?
- Do our policies appropriately reflect the most recent legislative obligations? Do they foster a safe and respectful workplace?

Contact us

Form specific advice tailored to your circumstances, please contact a member of our Employment team.

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[1] *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657.

[2] [2016] VSCA 334.

[3] *Copyright Act 1968* s 35(3) and *Designs Act 2003* s 31(b).

[4] *Courier Pete Pty Ltd v Metroll Queensland Pty Ltd* [2010] FCA 735.

[5] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366.